

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

OLIVIA U. TORRES,

No. C 08-1940 MHP

Plaintiff,

v.

UNUM LIFE INSURANCE COMPANY OF  
AMERICA,**MEMORANDUM & ORDER**

Defendant.

**Re: Defendant's Motion for Partial  
Summary Judgment and Defendant's  
Motion for Judgment on the Pleadings**

Plaintiff Olivia U. Torres ("Torres") brought suit against defendant Unum Life Insurance Company of America ("Unum"), alleging numerous causes of action in tort and contract, in connection with defendant's denial of plaintiff's long-term disability ("LTD") claim. Now before the court is Unum's motion for partial summary judgment or adjudication of issues with respect to the first, second, fourth, and sixth claims for relief, as well as Unum's motion for judgment on the pleadings with respect to the fourth, fifth, and sixth claims for relief. The court has considered the parties' arguments, and for the reasons stated below, the court enters the following memorandum and order.

**BACKGROUND**

Plaintiff was a departmental secretary for the Chief of Police of the City of Alameda. Joint Statement of Undisputed Facts ("JSUF") ¶ 1. She was insured under a non-contributory group disability group insurance policy issued by Unum to the City of Alameda. Id. ¶ 2. Because the plan is a governmental plan, it is exempt from the Employee Retirement Income Security Act of 1974

1 (“ERISA”), 29 U.S.C. Section 1134, and is governed by California law. Id. ¶ 3. On October 31,  
2 2002, plaintiff ceased work, due to major depression, irritable bowel syndrome, asthma,  
3 hypertension, and breast cancer. See id. ¶ 4; Codiga Dec., Exh. 3. Plaintiff’s subsequent LTD claim  
4 was approved effective January 29, 2003. JSUF ¶ 5. Unum paid plaintiff’s LTD claim until  
5 September 4, 2003, when upon investigation, Unum determined that she no longer satisfied the  
6 policy definition of disability. Id. ¶ 6; Codiga Dec., Exh. 3.

7 Plaintiff submitted an appeal on March 2, 2004, requesting more time to provide additional  
8 information to support her claim of ongoing disability. JSUF ¶ 7; Codiga Dec., Exh. 3. Unum  
9 granted plaintiff a forty-five-day extension to April 16, 2004, and received additional records from  
10 plaintiff on April 15, 2004. JSUF ¶¶ 8-9. Based on the information it received, Unum notified  
11 plaintiff in a July 30, 2004 letter that her benefits would be extended to November 19, 2003. JSUF ¶  
12 10; Codiga Dec., Exh. 3. That letter indicated that if plaintiff had additional medical records to  
13 support her claim of ongoing disability, she could provide them by August 30, 2004 or her claim  
14 would remain closed. JSUF ¶ 12-13; Codiga Dec., Exh. 3. Unum did not receive any additional  
15 records from plaintiff; thus, plaintiff received notice of the denial of her claim on or about July 30,  
16 2004. JSUF ¶ 14. Plaintiff was issued a lump sum payment for the period of time from September  
17 5, 2003 through November 19, 2003. Codiga Dec., Exh. 3.

18 Around this same time period, beginning in September 2003, Unum and other subsidiaries of  
19 UnumProvident Corporation became the subject of a nationwide market conduct examination by  
20 state insurance regulators, who sought to determine whether the companies used unfair claim  
21 settlement practices. Griffin Dec., Exh. 1 at 1-2. Contemporaneously, the United States Department  
22 of Labor conducted an investigation of the companies pursuant to ERISA. Id. As a result of both  
23 investigations, UnumProvident was fined \$15 million and its companies agreed to implement a  
24 corrective plan of action set forth in a Regulatory Settlement Agreement (“RSA”). Id. at 2-3. The  
25 RSA’s official implementation date was January 19, 2005. Codiga Dec., Exh. 2.

26 Relevant to the instant action is the RSA’s requirement that Unum offer reassessment of any  
27 claims that were denied or benefits that were terminated on or after January 1, 2000, which includes  
28 plaintiff’s claim denial. JSUF ¶ 15; Griffin Dec., Exh. 1 at 10. The RSA’s “Claim Reassessment

1 Process" required Unum to form a "Claim Reassessment Unit" to handle the reassessments and to  
2 mail notices to all eligible claimants. Griffin Dec., Exh. 1 at 9-10. The RSA provided that any  
3 applicable statutes of limitations would be tolled during the pendency of the reassessment process.  
4 JSUF ¶ 16; Griffin Dec., Exh. 1 at 14. Plaintiff opted into the reassessment process on September  
5 22, 2005. JSUF ¶ 17; Griffin Dec., Exh. 2 at 16. Unum acknowledged receipt of plaintiff's election  
6 to participate in the reassessment in an October 11, 2005 letter. Griffin Dec., Exh. 2 at 23.

7 A year later, Unum notified plaintiff in an October 19, 2006 letter that it was ready to begin  
8 the reassessment of her claim and enclosed for her completion an eight-page Reassessment  
9 Information Form to be submitted within sixty days. Griffin Dec., Exh. 2 at 28-38. The letter also  
10 gave plaintiff the option of submitting within sixty days a request for additional time to complete the  
11 form. Id. at 28. The Reassessment Information Form required plaintiff to provide personal,  
12 employment, medical, and financial information. Id. It also included a "Conditional Waiver and  
13 Release" which stated, "any applicable statute of limitations is tolled during the pendency of the  
14 reassessment of my claim; however, I understand that my participation in the Claim Reassessment  
15 Process will not revive or reinitiate the statute of limitations with respect to the previous claim  
16 decision." Id. at 37. Plaintiff failed to send the form to Unum, or request an extension of time to do  
17 so within the sixty-day deadline. On January 17, 2007, plaintiff sent a letter to Unum requesting an  
18 extension to file the form because she had been in the process of moving in December 2006. Id. at  
19 8. In a January 18, 2007 letter, Unum denied plaintiff's request for an extension as untimely and  
20 advised her that she was therefore no longer eligible to participate in the reassessment process. Id. at  
21 14.

22 Plaintiff filed suit against Unum over a year later on April 11, 2008, alleging three causes of  
23 action: breach of the implied covenant of good faith and fair dealing ("bad faith"), intentional  
24 infliction of emotional distress ("IIED"), and breach of contract. See Compl., Docket No. 1. The  
25 parties engaged in unsuccessful settlement negotiations in July 2008. Plaintiff then amended her  
26 complaint by stipulation to include three more claims of relief arising out of the settlement  
27 discussions: the fourth cause of action for bad faith, the fifth cause of action for violation of the  
28

1 Unruh Civil Rights Act, and the sixth cause of action for IIED. See Amended Compl., Docket No.  
2 20.

3 Unum now moves for partial summary judgment as to the first, second, fourth, and sixth  
4 claims (the bad faith and IIED claims), based on the two-year tort statutes of limitations. Unum also  
5 moves for a judgment on the pleadings as to the fourth, fifth, and sixth claims (bad faith, violation of  
6 the Unruh Civil Rights Act and IIED), based on the July 2008 settlement negotiations and a specific  
7 non-monetary term that plaintiff allegedly rejected.

8

9 **LEGAL STANDARDS**

10 I. **Summary Judgment**

11 Summary judgment is proper when the pleadings, discovery, and affidavits show that there is  
12 “no genuine issue as to any material fact and that the moving party is entitled to judgment as a  
13 matter of law.” Fed. R. Civ. P. 56(c). Material facts are those which may affect the outcome of the  
14 proceedings. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The party moving for  
15 summary judgment bears the burden of identifying those portions of the pleadings, discovery, and  
16 affidavits that demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett,  
17 477 U.S. 317, 323 (1986). On an issue for which the opposing party will have the burden of proof at  
18 trial, the moving party need only point out “that there is an absence of evidence to support the  
19 nonmoving party's case.” Id. at 325.

20 Once the moving party meets its initial burden, the nonmoving party must go beyond the  
21 pleadings and, by its own affidavits or discovery, “set forth specific facts showing that there is a  
22 genuine issue for trial.” Fed. R. Civ. P. 56(e). Mere allegations or denials do not defeat a moving  
23 party's allegations. Id.; see also Gasaway v. Northwestern Mut. Life Ins. Co., 26 F.3d 957, 960 (9th  
24 Cir. 1994). The court may not make credibility determinations and inferences drawn from the facts  
25 must be viewed in the light most favorable to the party opposing the motion. Anderson, 477 U.S. at  
26 249; Masson v. New Yorker Magazine, 501 U.S. 496, 520 (1991).

27

28

1 II. Judgment on the Pleadings

2 Federal Rule of Civil Procedure 12(c) provides that after the pleadings are closed but without  
3 causing delay to trial, parties may move for judgment on the pleadings. “A judgment on the  
4 pleadings is properly granted when, taking all allegations in the pleading as true, the moving party is  
5 entitled to judgment as a matter of law.” McGann v. Ernst & Young, 102 F.3d 390, 392 (9th  
6 Cir.1996). The essence of analysis under Rule 12(c) is “to determine whether, if the facts were as  
7 pleaded, they would entitle the plaintiff to a remedy.” Int’l Technologies Consultants, Inc., v.  
8 Pilkington PLC, 137 F.3d 1382, 1384 (9th Cir. 1998).

9  
10 DISCUSSION11 I. Defendant’s Motion for Partial Summary Judgment (Claims 1, 2, 4, and 6)12 A. The Statute of Limitations

13 In its motion for partial summary judgment, defendant argues that the statute of limitations  
14 has run on plaintiff’s tort claims, which encompass the first, second, fourth, and sixth claims.  
15 Plaintiff’s first and fourth causes of action allege that Unum breached the implied covenant of good  
16 faith and fair dealing (i.e., bad faith) through arbitrary termination of plaintiff’s LTD benefits and  
17 attempts to settle this action on improper terms. In California, the statute of limitations for bad faith  
18 claims is two years. See Cal. Code of Civ. Proc. § 339.1; see also, Smyth v. USAA Propr. & Cas.  
19 Ins. Co., 7 Cal. Rptr. 2d 694, 698 (1992). In insurance cases, the statute of limitations accrues upon  
20 the insurer’s “unconditional denial” of benefits. See Love v. Fire Ins. Exchange, 221 Cal. App. 3d  
21 1136, 1143 (1990). Plaintiff’s second and sixth causes of action allege IIED based on Unum’s initial  
22 denial of her benefits and later denial of her reassessment request. The statute of limitations for  
23 IIED is also two years. See Cal. Code of Civ. Proc. § 335.1.

24 The parties agree that the statute of limitations for both the bad faith and IIED claims is two  
25 years. Moreover, the parties do not differentiate between the start of the statute of limitations for the  
26 bad faith and IIED claims; in other words, they treat all tort claims as accruing from the same  
27 date—the day when plaintiff’s ongoing disability claim was denied. The parties disagree over the  
28 exact date on which this occurred.

1       Defendant argues that the statute of limitations on plaintiff's tort claims began to accrue on  
2 July 30, 2004, the date of defendant's letter advising plaintiff that her benefits would only be paid  
3 through November 19, 2003. Plaintiff contends that the July 30, 2004 letter is not an "unconditional  
4 denial" of benefits which would trigger the statute of limitations because it allowed plaintiff  
5 additional time to submit more medical records.

6       The court agrees with defendant and finds that the July 30, 2004 letter constitutes an  
7 unconditional denial of plaintiff's LTD coverage for purposes of the statute of limitations. Plaintiff  
8 was notified through that letter that her final payment would reflect a time period ending on  
9 November 19, 2003. Moreover, she has not received payments for any time period after that date.  
10 The letter also states,

11       we have determined that your client can perform her occupation as of November 20,  
12 2003 and, therefore, *the decision to deny the claim as of that date is appropriate.*

13       . . . we understand that you or your client may have additional medical records to  
14 support her ongoing disability. . . If we do not receive these records by August 30,  
2004, your client's claim *will remain closed.*"

15 Codiga Dec., Exh. 3 (emphasis added).

16       Thus, the letter explicitly notifies plaintiff that she would no longer receive payments for any  
17 time period after November 19, 2003. The letter also makes clear that unless additional medical  
18 records were sent to defendant by August 30, 2004, plaintiff's claim would "remain closed." It is  
19 established in California that "[a] statement of willingness to reconsider does not render a denial  
20 equivocal." Migliore v. Mid-Century Insurance Co., 118 Cal. Rptr. 2d 548, 606 (2002) (citation  
21 omitted). An insurer does not even have to use the words "deny" or "denial" for a denial to be  
22 unconditional. Id. The July 30, 2004 denial letter established that plaintiff's claim was closed as of  
23 that date and that there was a possibility of reopening it if she timely submitted more medical  
24 records. She did not. Thus, her claim was denied as of July 30, 2004.

25       The court finds unavailing plaintiff's argument that the statute of limitations began running  
26 on November 23, 2004, based on an October 19, 2006 letter in which defendant mistakenly states  
27 that "[plaintiff's] claim was closed or terminated on 11/23/2004." See Codiga Dec., Exh. 4.  
28 November 23, 2004 does not correspond to any dates otherwise recorded in this matter and,  
according to defendant, it was written in error or referenced an internal file closure date. Plaintiff

1 has failed to provide any plausible rationale as to why it would represent the legitimate termination  
2 date. Rather, plaintiff's counsel has explicitly acknowledged in correspondence with defendant that  
3 "[plaintiff's] benefits were terminated effective November 19, 2003." See Griffin Dec., Exh. 2 at 16  
4 (September 22, 2005 letter from plaintiff's counsel to Unum). The court rejects plaintiff's attempt to  
5 begin the statute of limitations on a date which she clearly knows is wholly unsupported by the  
6 record. Plaintiff's claims for bad faith and IIED are barred, therefore, if she did not file her initial  
7 complaint for damages within two years of July 30, 2004, less any period of tolling.

8       B.     The Tolling Period

9       The parties dispute the exact date on which the tolling period began under the RSA, although  
10 they both agree that it ended on January 18, 2007, when Unum notified plaintiff that she was no  
11 longer eligible for reassessment. The disagreement between plaintiff and defendant turns upon the  
12 interpretation of section B.2.d of the RSA, which states that "any applicable statutes of limitations  
13 shall be tolled during the pendency of the Claim Reassessment Process." See Griffin Dec., Exh. 1 at  
14 14. Plaintiff argues for a broad interpretation of the "Claim Reassessment Process" which would  
15 begin tolling as early as the day the RSA was enacted, while defendant prefers a narrower reading  
16 that would begin tolling on the day plaintiff opted into her particular reassessment.

17       Specifically, defendant argues that the tolling period began on September 22, 2005, when  
18 plaintiff opted into the reassessment process by formal letter from her attorney. Plaintiff proposes  
19 different dates on which the tolling may have started: November 18, 2004, the date when Unum  
20 signed the RSA; February 9, 2005, the date by which Unum was required to mail notices to eligible  
21 claimants; or February 18, 2005, the date by which Unum was required to form a "Claims  
22 Reassessment Unit" to handle review of the reassessment claims.

23       The court finds that the tolling period appropriately began on September 22, 2005, when  
24 plaintiff opted into the reassessment. Any ambiguity as to the start of the tolling period was resolved  
25 by the October 19, 2006 letter from Unum, which included a "Conditional Waiver and Release" to  
26 be signed by plaintiff that specifically stated, "any applicable statute of limitations tolled during the  
27 pendency of the reassessment of my claim." Griffin Dec., Exh. 2 at 37. This made it explicit to  
28 plaintiff that her claims would only be tolled during the reassessment of her particular claim.

1 Notably, tolling from September 22, 2005 in no way prejudiced plaintiff's ability to bring  
2 forth the instant action in a timely manner. Plaintiff's September 22, 2005 letter opting into  
3 reassessment was written approximately a year and two months after her July 30, 2004 claim denial.  
4 Plaintiff thus opted into the reassessment process when she had about ten months remaining on the  
5 two-year limitations period. By opting into reassessment and its tolling provision then, she  
6 preserved her right to sue within approximately ten months of receiving a reassessment decision.  
7 However, plaintiff failed to timely exercise her right once her reassessment was denied on January  
8 18, 2007. Instead, plaintiff waited over a year and three months to bring her suit on April 11, 2008.

9 Plaintiff's proposed tolling dates are flawed because they focus on dates of actions taken by  
10 defendant, when they should focus on actions taken by the plaintiff as claimant. Plaintiff urges the  
11 court to turn a blind eye to her failure to meet deadlines by alleging that defendant itself failed to  
12 timely send her notice of the Claim Reassessment Process. The RSA required Unum to provide  
13 initial notice to Specified Claimants of the Claim Reassessment Process no later than the fifteenth  
14 business day following January 19, 2005, the RSA's official Implementation Date. See RSA B.2.b,  
15 Griffin Dec., Exh. 1 at 10; Codiga Dec., Exh. 2. This meant that Unum was required to send notices  
16 to eligible claimants by February 9, 2005. Unum did not send plaintiff her notice until June 21,  
17 2005.<sup>1</sup> Plaintiff argues that this is evidence of Unum's dilatoriness which, taken to the extreme,  
18 would have deprived her of notice long enough such that she would have opted into the Claim  
19 Reassessment Process after the statutes of limitations had run on her claims. Thus, plaintiff  
20 contends that fairness considerations militate in favor of starting the tolling period on or around the  
21 date that the RSA was enacted.

22 The court is not persuaded by this argument, which paints an incomplete picture of the RSA  
23 and its relationship to California claimants. California was one of two states which declined to sign  
24 the RSA in November 2004 and instead came to an independent agreement, the California  
25 Settlement Agreement ("CSA"), with Unum on October 3, 2005. See CSA III.<sup>2</sup> Although California  
26 was not an official party to the RSA, California claimants were still eligible for reassessment and  
27 many, like plaintiff, received reassessment notices before the CSA was signed. Id. at III.A. The  
28 CSA required Unum to send notice to and receive reassessment requests from eligible California

1 claimants who had not yet elected to participate in the RSA Reassessment by the CSA's  
2 Implementation Date of approximately November 1, 2005. Id. at III.B.2; CSA Exh. C. The RSA  
3 was amended accordingly, such that the RSA's notice provision would "not apply to such claimants  
4 residing in any state that has not joined the RSA and that has a separate settlement agreement with  
5 the Companies addressing the notice issue for claimants in that state." See Amendment to  
6 Regulatory Settlement Agreement.<sup>3</sup> Moreover, any California claimants, like plaintiff, who had  
7 already opted into the RSA would have their reassessments performed under the rules and  
8 procedures set forth in the CSA, not the RSA. See CSA III.A. Thus, the RSA's Implementation  
9 Date of January 19, 2005 and its accompanying notice deadlines, no longer had any bearing on  
10 plaintiff's reassessment once the CSA was signed. See RSA B.2.b, Griffin Dec., Exh. 1 at 10;  
11 Codiga Dec., Exh. 2. In fact, plaintiff received her notice *early* by CSA standards, negating  
12 plaintiff's allegation of dilatoriness on Unum's part. Even if plaintiff had received notice of  
13 reassessment and started the tolling period as late as November 2005, she still would have had  
14 several months to bring her suit after her reassessment denial.

15 The court similarly rejects plaintiff's attempt at oral argument to take terms such as "Claim  
16 Reassessment Process" out of the larger context of the RSA. As previously discussed, section B.2.d  
17 of the RSA states that "any applicable statutes of limitations shall be tolled during the pendency of  
18 the Claim Reassessment Process." See Griffin Dec., Exh. 1 at 14. Plaintiff contends that "Claim  
19 Reassessment Process" refers not to claimants' individual reassessments, but to the general  
20 procedures set forth in the RSA, which became effective on or around the RSA's Implementation  
21 Date of January 19, 2005. Plaintiff's position is untenable because the RSA makes clear that the  
22 reassessment process is "entirely optional," RSA B.2.d., and is replete with language that indicates  
23 that each eligible claimant must take affirmative steps to enroll into the Claim Reassessment  
24 Process. Griffin Dec., Exh. 1 at 13; see also RSA B.2.b, Griffin Dec., Exh. 1 at 10 (notices must be  
25 sent to specified claimants "advising that they may resubmit their claim for further review"); RSA  
26 B.2.b.1, Griffin Dec., Exh. 1 at 11 (the reassessment process "will be available" to those "who elect  
27 to participate"); RSA B.2.b.3, Griffin Dec., Exh. 1 at 11 (Unum must notify claimants "how to  
28 communicate . . . election to participate" and must send "[acknowledgments] of their election to

1 participate”). Thus, plaintiff and those similarly situated could only partake in the reassessment  
2 process and benefit from its tolling provisions once they had personally elected to participate, not  
3 when the Claim Reassessment Process was implemented in general.

4 Plaintiff contends that the RSA should be analogized to a class action suit such that the  
5 pendency of the reassessment process as to all claimants tolled the statute of limitations for any  
6 individual claimant. The court declines to apply class action principles to the RSA, which is  
7 essentially a contract among Unum, state insurance regulators, the Department of Labor, and eligible  
8 claimants who opted into reassessment. The court also finds unconvincing plaintiff’s argument that  
9 the sixty-day time period provided by defendant to complete the Reassessment Information Form  
10 was unreasonable. Either the form *or* a request for an extension to complete the form, was due  
11 within sixty days. Plaintiff failed to submit either. Moreover, notice was given to plaintiff in the  
12 original October 11, 2005 letter acknowledging receipt of plaintiff’s election to participate in the  
13 reassessment that, when reassessment began, plaintiff would have sixty days to submit an  
14 information form. Thus, in effect, plaintiff had over a year’s notice that action would need to be  
15 taken at some date in the future within two months. The court does not find this unreasonable.

16 Thus, the statute of limitations started to run on July 30, 2004 and was tolled during  
17 plaintiff’s claim reassessment process, which took place between September 22, 2005 and January  
18 18, 2007. Taking into account these dates and the tolling period, a total of two years and 136 days  
19 has elapsed from the date of notice of plaintiff’s claim denial to the date that plaintiff filed this suit.  
20 The court therefore GRANTS defendant’s motion for partial summary judgment as to the first and  
21 second claims for relief, as they relate entirely to the July 30, 2004 claim denial as well as the fourth  
22 and sixth claims for relief, to the extent that they relate to the July 30, 2004 claim denial.

23 However, the court DENIES in part defendant’s motion for summary judgment as to the  
24 fourth and sixth claims for relief to the extent that they relate to the July 2008 settlement  
25 negotiations because the two-year statutes of limitations have not yet run on those claims.  
26 Defendant’s argument that the fourth and sixth claims are barred because they relate to confidential  
27 settlement negotiations is addressed in the following section.

28

1 II. Defendant's Motion for Judgment on the Pleadings (Claims, 4, 5, and 6)

2 Plaintiff's fourth, fifth, and sixth claims for bad faith, violation of the Unruh Civil Rights  
3 Act, and IIED, respectively, are based upon unsuccessful settlement negotiations from July 2008 and  
4 a specific non-monetary term that plaintiff rejected. Defendant contends that these three claims for  
5 relief are premised upon hypothetical relief, based on what would have happened if plaintiff had  
6 accepted the terms of a proposed settlement agreement, which she did not.

7 Specifically, defendant argues that (1) the fifth claim is not ripe for adjudication and plaintiff  
8 lacks standing because it alleges a hypothetical future violation of the Unruh Act, and (2) that the  
9 fourth, fifth, and sixth claims necessarily fail because they are based upon inadmissible settlement  
10 communications under Federal Rule of Evidence 408 and privileged litigation statements under  
11 California Civil Code Section 47(b). Each of these arguments will be discussed in turn.

12 A. Violation of the Unruh Civil Rights Act (Claim 5)

13 Plaintiff's fifth claim alleges a violation of California's Unruh Civil Rights Act, California  
14 Civil Code section 51 *et seq.* ("Unruh Act"). The Unruh Act provides:

15 All persons within the jurisdiction of this state are free and equal, and no matter what  
16 their sex, race, color, religion, ancestry, national origin, *disability, or medical*  
17 *condition* are entitled to the full and equal accommodations, advantages, facilities,  
privileges, or services in all business establishments of every kind whatsoever.

18 Cal. Civ. Code § 51(b) (emphasis added).

19 The Act also provides that,

20 No business establishment of any kind whatsoever shall discriminate against, boycott  
21 or blacklist, or refuse to buy from, contract with, sell to, or trade with any person in  
this state because of the race, creed, religion, color, national origin, sex, *disability, or*  
*medical condition* of the person...

22 Id. at 51.5(a) (emphasis added).

23 "The Unruh Civil Rights Act works to ensure that all persons receive the full  
24 accommodations of any business within California, regardless of the person's disabilities."

25 Goldman v. Standard Ins. Co., 341 F.3d 1023, 1027 (9th Cir. 2003) (citation omitted). The  
26 insurance business is subject to the Unruh Act. See Cal. Ins. Code § 1861.03(a). An insurance  
27 company's refusal to provide coverage on the basis of disability, or to provide disparate treatment  
28 and pricing in coverage on such basis, may constitute a violation if the discrimination is

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1 unreasonable. See Chabner v. United of Omaha Life Ins. Co., 225 F.3d 1042, 1050 (9th Cir. 2000)  
2 (noting that certain types of pricing differentials in coverage that are reasonable and therefore not  
3 arbitrary may not violate the Unruh Act).

4 Plaintiff alleges that defendant violated the Unruh Act during settlement negotiations by  
5 mandating certain non-monetary conditions in the release that plaintiff considers against public  
6 policy. Specifically, plaintiff asserts that the terms of defendant's proposed settlement, were they to  
7 have been accepted by plaintiff, would have lead to an illegal boycott of and a refusal to do future  
8 business with plaintiff based on her cancer and related mental condition.<sup>4</sup> Plaintiff essentially argues  
9 that although defendant's alleged discrimination was merely proposed and not actual, it nonetheless  
10 constituted a violation of the Unruh Act. Plaintiff contends that defendant conditioned its agreement  
11 to pay the money it owed plaintiff on her agreement to be the victim of discrimination and the loss of  
12 money constitutes a current injury. Plaintiff's claim for relief includes an injunction prohibiting  
13 defendant from inserting the allegedly violative terms in its release and settlement agreements.

14 Defendant argues that plaintiff has not suffered an actual injury that would give her standing  
15 to sue. Since plaintiff rejected the terms of the settlement offered, defendant contends that none of  
16 the hypothetical violations plaintiff alleges could come to pass. Moreover, defendant argues that the  
17 relief plaintiff seeks would not necessarily remedy her alleged injury because defendant could  
18 simply choose not to settle with her.

19 Article III of the United States Constitution confines the federal courts to adjudicating actual  
20 "cases and controversies" and requires a litigant to have standing to invoke the power of the federal  
21 court. Allen v. Wright, 468 U.S. 737, 750 (1984). The doctrine of standing is comprised of both  
22 constitutional requirements and prudential considerations. Hartman v. Summers, 120 F.3d 157, 159  
23 (9th Cir. 1997). Constitutional standing generally requires a showing of three elements:

24 First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally  
25 protected interest which is (a) concrete and particularized, and (b) "actual or  
26 imminent, not 'conjectural' or 'hypothetical'... Second, there must be a causal  
27 connection between the injury and the conduct complained of—the injury has to be  
"fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result  
[of] the independent action of some third party not before the court." Third, it must  
be "likely," as opposed to merely "speculative," that the injury will be "redressed by  
a favorable decision."

28 Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (internal citations omitted).

1       The party invoking federal jurisdiction bears the burden of establishing those elements. Id. at  
2 561. Moreover, the Ninth Circuit has held: “To meet this burden at the summary judgment stage,  
3 [the plaintiff] ‘must set forth by affidavit or other evidence specific facts’ supporting each element.”  
4 S.D. Myers, Inc. v. City and County of San Francisco, 253 F.3d 461, 474 (9th Cir. 2001) (citing  
5 Lujan, 504 U.S. at 561).

6       As to the first element, plaintiff has not demonstrated that she has suffered an “actual or  
7 imminent” injury. See Lujan, 504 U.S. at 555. “To confer standing, the threat of future injury must  
8 be credible rather than remote or hypothetical.” Hartman, 120 F.3d at 160 (citation omitted). A  
9 plaintiff must show “a very significant possibility that the future harm will ensue.” Id. (citation  
10 omitted). The Supreme Court in Lujan held that plaintiffs did not have standing because they did  
11 not suffer an “injury in fact.” 504 U.S. at 564. The Court found that plaintiffs’ assertion that harm  
12 could occur at some indefinite point in the future was insufficient because “[s]uch ‘some day  
13 intentions’—without any description of concrete plans, or indeed even any specification of when the  
14 some day will be—do not support a finding of ‘actual or imminent’ injury that our cases require.”  
15 Id. Using this line of reasoning in Hartman, the Ninth Circuit found that a habeas petitioner had not  
16 yet suffered a harm under the release statute he challenged as unconstitutional, because he had not  
17 yet filed or demonstrated an intention to file an application for release under that statute. 120 F.3d at  
18 160. Thus, notwithstanding that the statute could well be unconstitutional, the court declined to  
19 grant standing. Id.

20       Similarly, in the instant action, although the settlement terms offered by defendant  
21 purportedly lead to future violations the Unruh Act, the court must decline to grant plaintiff  
22 standing. Plaintiff acknowledges that her harm would only be realized through a series of  
23 hypothetical events: She would first have to sign the settlement agreement, apply for insurance from  
24 defendant, and then be rejected by defendant based on discrimination that specifically violates the  
25 Unruh Act. Furthermore, plaintiff has not even asserted that she would in fact seek insurance  
26 coverage from Unum again, nor has she demonstrated that Unum would reject such a request by  
27 specifically violating the Unruh Act. The uncertainty that lies in possible future violations of the  
28 Unruh Act thus precludes plaintiff’s conjectural injury from being an actual injury.

1        Although plaintiff originally asserted that defendant's violation of the Unruh Act would only  
2 occur if she accepted the settlement agreement, she additionally contends in her opposition that a  
3 violation has already occurred. Specifically, plaintiff argues that she has been injured by  
4 defendant's failure to pay her ongoing disability claim, which has allegedly been withheld because  
5 plaintiff will not agree to Unum's future violation of the Unruh Act. Plaintiff is inconsistent in her  
6 arguments and often conflates her breach of contract claim with her claims sounding in tort. The  
7 court remarks upon plaintiff's delicate word smithing, in arguing that the payment of monies due on  
8 her claim is both an "advantage" under the Unruh Act, to which she is entitled to her full and equal  
9 extent, and a present "claim" upon which she is entitled to collect under the terms of her insurance.  
10 Whether a contractual obligation can be linked with an advantage under the Act is not something for  
11 the court to address, given that matter is not essential to the holding. However, for future reference,  
12 the court advises the parties that clear arguments facilitate matters and arguments pled in the  
13 alternative are stronger if they are so noted.

14        Notwithstanding this point, plaintiff has failed to plead that the cause of her actual pecuniary  
15 injury is defendant's current discrimination based on her disability, which would be required to  
16 constitute a violation of the Unruh Act. Instead, plaintiff again relies upon a hypothetical future  
17 violation of the Unruh Act as the cause of her inability or unwillingness to accept settlement and to  
18 thus recoup any payment/claim/advantage that defendant may owe her. Thus, plaintiff continues to  
19 lack standing to bring her Unruh Act claims based on the proposed settlement terms.

20        The court further finds that, as to the second element of standing, plaintiff is not able to  
21 prove any kind of causation between her future injury and defendant's future illegal conduct  
22 precisely because such conduct is completely conjectural. The court also finds that plaintiff has  
23 failed to meet her burden of proving that a favorable outcome as to her Unruh claim would redress  
24 her harm. Even if the court were to order defendant to rework its settlement agreement, defendant  
25 could easily refuse to settle with plaintiff. The court rejects plaintiff's claim that settlement may be  
26 mandatory in the context of insurance claims. California's Unfair Insurance Practices Act cited by  
27 plaintiff, which prohibits the practice of "[n]ot attempting in good faith to effectuate prompt, fair,  
28 and equitable settlements of claims in which liability has become reasonably clear," is inapplicable

1 because plaintiff has failed to demonstrate that defendant's liability for violations of the Unruh Act  
2 is "reasonably clear." See Cal. Ins. Code § 790.03(h)(5). More fundamentally, however, there is no  
3 private cause of action for insureds to bring a claim against an insurer for unfair practices in settling  
4 claims under section 790.03 unless a final judicial determination of the insured's liability has been  
5 first obtained. Moradi-Shalal v. Fireman's Fund Ins. Companies, 46 Cal.3d 287, 313 (1988); See  
6 also, Chabner, 225 F.3d at 1049-51. Thus, plaintiff's standing fails on all accounts.

7 In sum, defendant's purported settlement terms may indeed be malicious and oppressive as  
8 plaintiff asserts, but they are not actionable under the Unruh Act as currently plead by plaintiff.  
9 Plaintiff's Unruh Act claim thus fails and defendant's motion for summary judgment as to plaintiff's  
10 fifth claim for relief is GRANTED.

11 B. Admissibility of Settlement Negotiations

12 Defendant argues that plaintiff's fourth, fifth, and sixth claims, for bad faith, Unruh Act  
13 violations, and IIED, respectively, all depend on inadmissible statements made during the course of  
14 settlement negotiations and are thus barred irrespective of their merits. Plaintiff's fourth cause of  
15 action for bad faith alleges that defendant's settlement terms violate numerous provisions of  
16 California's Unfair Insurance Practices Act. The sixth cause of action for IIED alleges that  
17 defendant has acted outrageously, that the proposed settlement violates multiple sections of the  
18 Unfair Insurance Practices Act and the Unruh Civil Rights Act, that defendant has violated the  
19 standard of practice for insurers toward their insureds, and that defendant's management has a policy  
20 of forcing its insureds to forego their rights. Plaintiff's fourth and sixth claims offer the settlement  
21 negotiations as the basis for liability for bad faith and IIED.

22 Defendant argues that the claims related to settlement discussions are inadmissible under  
23 Federal Rule of Evidence 408(a) and privileged by California Civil Code section 47(b). Because the  
24 court finds that California Civil Code section 47(b) in itself bars plaintiff's fourth and sixth tort  
25 claims based on settlement negotiations, it need not reach defendant's argument for inadmissibility  
26 under the federal rules.

27 California Civil Code section 47(b) ("litigation privilege") provides that "[a] privileged  
28 publication or broadcast is one made . . . in any (1) legislative or (2) judicial proceeding, . . . ."

1 Although originally restricted to defamation actions, the privilege is now given broad application  
2 and immunizes defendants from tort liability for all torts except malicious prosecution. See Silberg  
3 v. Anderson, 50 Cal. 3d 205, 211-12 (1990) (holding that the only tort claim that can be based on  
4 litigation conduct or the filing of litigation is a claim for malicious prosecution). The privilege is  
5 “intended to encourage parties to feel free to exercise their fundamental right of resort to the courts  
6 for assistance in the resolution of their disputes, without being chilled from exercising this right by  
7 the fear that they may subsequently be sued in a derivative tort action arising out of something said  
8 or done in the context of the litigation.” Edwards v. Centex Real Estate Corp., 53 Cal. App. 4th 15,  
9 29 (1997). Given the importance of the privilege, it is absolute in nature. Silberg, 50 Cal. 3d at 215;  
10 see also, Ribas v. Clark, 38 Cal.3d 355, 364 (1985) (holding that the tortious nature and purpose of  
11 defendant’s actions does not negate privilege).

12 In terms of the types of “publications” that are statutorily protected, the California Supreme  
13 Court has held that the privilege applies to “any communication (1) made in judicial or quasi-  
14 judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the  
15 objects of the litigation; and (4) that have some connection or logical relation to the action.” Silberg,  
16 50 Cal. 3d at 212. Further, the privilege applies to “any publication required or permitted by law in  
17 the course of a judicial proceeding to achieve the objects of the litigation, even though the  
18 publication is made outside the courtroom and no function of the court or its officers is involved.”  
19 Id.

20 Settlement negotiations have been found to fit within this privilege. See, e.g., Home Ins. Co.  
21 v. Zurich Ins. Co., 96 Cal. App. 4th 17, 23 (2002) (finding that defendant’s misrepresentation of  
22 terms of insurance policy to induce settlement was absolutely privileged and not actionable in  
23 derivative suit alleging intentional and negligent misrepresentation); see also Rosenthal v. Irell &  
24 Manella, 135 Cal. App. 3d 121 (1982) (holding that plaintiff could not sustain action for intentional  
25 infliction of emotional distress and other torts because the challenged communications that induced  
26 settlement were privileged). Moreover, “[a]ny doubt as to whether the privilege applies is resolved  
27 in favor of applying it.” Home Ins. Co., 96 Cal. App. 4th at 23.

28

1 It has even been found that “communications made in connection with litigation do not  
 2 necessarily fall outside the privilege simply because they are, or are alleged to be, fraudulent,  
 3 perjurious, unethical, or even illegal.” Kashian v. Harriman, 98 Cal. App. 4th 892, 920 (2002). By  
 4 analogy to the instant action, even when viewed in the light most favorable to plaintiff, if the terms  
 5 of defendant’s settlement agreement did constitute unfair insurance practices or misrepresent  
 6 plaintiff’s future rights, plaintiff’s tort actions would still be barred.

7 The California Supreme Court has recognized that “strict application of the privilege to  
 8 disallow derivative tort actions necessarily means some injuries will go uncompensated.” Silberg,  
 9 50 Cal. 3d at 218. At the same time, however, it reasons that “the evils inherent in permitting  
 10 derivative tort actions based on communications during the trial of a previous action are . . . far more  
 11 destructive to the administration of justice than an occasional ‘unfair’ result.” Id. at 213.

12 Thus, the court finds that plaintiff’s fourth and sixth tort claims relating to settlement  
 13 negotiations is barred under the litigation privilege, and thus GRANTS defendant’s motion for  
 14 judgment on the pleadings as to those claims.

15

16 **CONCLUSION**

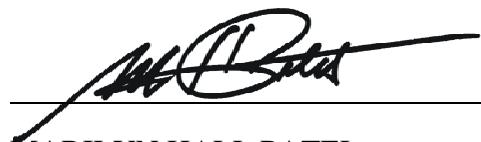
17 For the foregoing reasons, defendant’s motion for partial summary judgment as to the first  
 18 and second claims is GRANTED. Defendant’s motion for judgment on the pleadings as to the  
 19 fourth, fifth, and sixth claims is GRANTED.

20 As a result, all claims in the instant action have been eliminated except plaintiff’s third claim  
 21 for breach of contract. As acknowledged by plaintiff, the granting of these motions has eliminated  
 22 all claims for general damages and punitive damages and only contract claims for back benefits  
 23 remain. The court notes that the deadline for completion of court-sponsored mediation has expired  
 24 and defendant’s motion for extension of the deadline is still pending. See Docket No. 29.

25 The court further orders that the parties shall complete the selected ADR procedure within  
 26 sixty (60) days of the date of this order.

27 **IT IS SO ORDERED.**

28 Dated: January 8, 2009



MARILYN HALL PATEL  
 United States District Court Judge

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### ENDNOTES

1. In the September 22, 2005 letter by which she opted plaintiff into reassessment, plaintiff's counsel Karen K. Wind indicated that plaintiff never received the June 21, 2005 notice of the RSA (a copy of which has been provided by defendant) because it was erroneously sent to plaintiff's last-known address rather than to plaintiff's counsel.
2. The CSA included provisions the RSA did not, namely, a third-party review of claim reassessment by insurance experts, to limit the discretion insurers have to interpret policy language and establishes a model policy that Unum and other disability insurers must adhere to in the state. See <http://www.sec.gov/Archives/edgar/data/5513/000119312505195355/dex101.htm>.
3. See [http://maine.gov/pfr/insurance/unum/UNUM\\_RSA\\_Amendment.htm](http://maine.gov/pfr/insurance/unum/UNUM_RSA_Amendment.htm).
4. Upon stipulation and order the court, the parties agreed not to include the specific terms of the settlement agreement in the pleadings. Defendant noted elsewhere, however, that disabilities due to mental illness have a limited pay period up to twenty-four months under plaintiff's relevant policy. See Codiga Dec., Exh. 3.